UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 572

Case No. 611: SUNDARAM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 2 January 1991, N.K. Kalyana Sundaram, a staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended to 28 June and 31 July 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 June 1991, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"II. PLEAS

The Applicant

(a) contests the JAB's [Joint Appeals Board] recommendation and the decision of the Secretary-General as conveyed by the Under-Secretary-General for Administration and Management vide letter No.2-6-1 dated 12 October 1990;

(b) ...

(c) seeks compensation of an amount of US$ 12,000 for the injury sustained, the social degradation the Applicant suffered and for having lost the numerous promotional opportunities [the] 1992-1993 Budget offered, as a result of breach of procedure;

(d) seeks ... [that the Tribunal] order the Respondent to promote the Applicant to the contested post at ND-7 level effective 1 January 1990 in view of the fact that the relevant procedures have been breached;

(e) ... [requests that the Tribunal summon] the recorded findings of SAP [Selection Advisory Panel] and the recommendations of APC [Appointment and Promotion Committee] ..."

Whereas the Respondent filed his answer on 12 February 1992;

Whereas the Applicant filed written observations on 15 April 1992;

Whereas the Applicant filed an addendum to the written observations on 27 April 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 27 November 1967, as a locally recruited Clerk-Typist in the UNICEF Office at New Delhi, India. He was initially offered a short-term appointment at the ND-3 level, which was successively extended until 1 July 1973, when he was offered a probationary appointment. On 1 January 1974, the Applicant's appointment was converted to a regular appointment. During the course of his employment with UNICEF, the Applicant received successive promotions, having reached the ND-6 level on 1 August 1981, with the functional title of Programme Assistant. Thereafter, the Applicant's post was upgraded to the ND-7 level with the title of Senior Programme Assistant, West India Office (WIO).

On 29 August 1989, the Division of Personnel issued a Vacancy Announcement to advertise the ND-7 post of Senior Programme Assistant, WIO, encumbered by the Applicant. The announcement was in accordance with the applicable guidelines contained in UNICEF administrative instruction CF/AI/352/Amend.4 and Add.1. Three staff members applied for the position, including the Applicant.

According to the record, a Selection Advisory Panel (SAP), consisting of a representative of the local General Service Appointment and Promotion Committee (APC), together with a representative from the Division of Personnel and the Applicant's supervisor, met on 21 November 1989, to consider the applications for the post. After reviewing the qualifications of all the candidates, the Panel unanimously recommended to the local APC that a candidate other than the Applicant be appointed to the post.

According to the Minutes of the meeting of the General Service APC held on 14 December 1989, "three members of the Committee recommended that [the staff member recommended by the SAP] be appointed to the upgraded post, ... However, two members were of the view that [the Applicant] who is the incumbent of the post, should be appointed to the upgraded level of the post".

In a letter dated 2 January 1990, a Personnel Officer informed the Applicant that he had not been selected to fill the post which he encumbered and which had been upgraded and that the Administration had decided to place him against the post of Programme Assistant at the ND-6 level, with effect from 1 January 1990.

On 10 January 1990, the Applicant requested the Director of the India Country Office (ICO) to review this decision. In a reply dated 22 January 1990, the Director, ICO, informed the Applicant that the decision would be maintained.

On 18 February 1990, the Applicant requested the Executive Director, under staff rule 111.2, to review the administrative decision not to appoint him to the post of Senior Programme Assistant. In a reply dated 7 May 1990, the Deputy Executive Director informed the Applicant that the decision would be maintained.

On 23 May 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 9 October 1990. Its considerations, conclusion and recommendation read, in part, as follows:

"Considerations

...

21. The Panel considered that the basic question in this appeal is whether the decision to select a candidate other than himself leading to his non-promotion to the ND-7 level could be construed as a non-observance of his terms of appointment, ...

22. Before reaching a conclusion on this issue, the Panel examined the procedure followed in the review of candidates for the upgraded post by the Selection Advisory Panel and by the Appointment and Placement Committee. This seemed to have been in compliance with the conditions of the UNICEF Administrative Instructions governing the Appointment of Candidates to Upgraded Posts which are Encumbered. ...

23. The Panel, of course, was not in a position to compare the qualifications and performance of the selected candidate with those of the appellant, nor did it consider such comparison as falling within its competence, particularly as there was no allegation by the appellant that the decision had been influenced by prejudice or extraneous factors.

24. The Panel, in its deliberations, took guidance from the opinion expressed by the Administrative Tribunal in its Judgement No. 312 (Roberts) wherein it stated that 'as far as promotions are concerned, the general rule is that they are subject to the discretion of the Secretary-General, ...

25. As already indicated, the Panel took note of the fact that the appellant has at no stage contended the presence of extraneous factors. ... At the same time, the appellant has also made no contention that in the review of his case there was any violation of the relevant UNICEF Administrative Instructions or the denial of due process. His request to the Administration to share with him the deliberations pertaining to his case was denied because there is no provision in the Administrative Instructions to permit such action.

Conclusion and Recommendation

26. Having fully considered this case, the Panel found no merit in the appeal and decided unanimously to make no recommendation in favour of the appeal."

On 12 October 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General, having re-examined the case in the light of the JAB report, had decided to maintain the contested decision.

On 19 June 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. In considering the Applicant with the other candidates for the job, the Respondent did not give the Applicant serious consideration for

promotion to the upgraded post which he encumbered, as required by the pertinent administrative instruction.

2. The APC recommendation was not a unanimous recommendation but only a majority recommendation.

3. The Applicant has been treated unjustly since the APC found him neither unsuitable for the job nor incapable of meeting the job requirements.

Whereas the Respondent's principal contention is:

The Applicant has no right to promotion but only a right to consideration for promotion according to established procedures. The Applicant was duly considered for promotion according to UNICEF's procedures and, consequently, his non-selection does not violate his rights.

The Tribunal, having deliberated from 22 October to 11 November 1992, now pronounces the following judgement:

I. The Applicant occupied the post of Programme Assistant in the UNICEF Office in Bombay at the ND-6 level. This post was reclassified in 1989, to the ND-7 level and, as a consequence, was advertised in an Internal Vacancy Notice, as required. Three candidates applied, including the Applicant. The Administration selected a candidate other than the Applicant.

II. The Applicant challenges this decision on the ground that his candidature was not given the "serious consideration" required by paragraph 3 of administrative instruction CF/AI/352/Amend.4/Add.1 of 21 February 1989, that reads as follows:

> "In implementing the provisions under Item 6 of AI/352/Amend.4, the local APC will accord serious consideration to the existing incumbent's performance, experience on the job, relevant qualifications and, where applicable, demonstrated potential while reviewing his/her suitability, together with other candidates, for appointment to the upgraded post."

III. The Applicant contends that the expression "serious consideration" should be construed as granting priority to the incumbent, who should be selected in all cases, except when it could be clearly established that he or

she was unsuitable for the post at its new level. The Tribunal grants that, in the context of the administrative instruction, the expression "serious consideration" is ambiguous, since it is evident that all candidates should always be considered "seriously"; not only the incumbent of the reclassified post. However, the Tribunal is unable to concur with the interpretation advanced by the Applicant.

If the Applicant's interpretation were to be accepted, such Vacancy Announcements would, in most cases, cease to have any purpose or meaning, since the new upgraded post would automatically be assigned to its current incumbent, other than in exceptional circumstances. Indeed, this might have been the case originally, when the rules contemplated the possibility of waiving the advertisement of encumbered posts, but that is no longer feasible, pursuant to paragraph 3 of CF/AI/352/Amend.4 of 15 July 1988, which reads as follows:

> "Bearing in mind our budgetary constraints and in order to offer all staff (including the incumbent of the post which has been upgraded) a fair opportunity to apply and compete for a limited number of new/upgraded posts, the provision of recommending to the APC the waiver of advertisement of upgraded posts will cease to be applicable."

IV. It is thus clear that the legal system governing reclassification requires that all reclassified posts should be announced. In consequence, as stated in the above quoted paragraph 3 of CF/AI/352/Amend.4, the system now offers "all staff (including the incumbent of the post which has been upgraded) a fair opportunity to apply and compete...". In the Tribunal's view, that "fair opportunity" would not exist if the selection process was conducted according to the Applicant's construction i.e. considering first the incumbent of the post and only going on to review the other candidates if the incumbent was found unsuitable.

V. Furthermore, the very wording of paragraph 3 of CF/AI/352/Amend.4/Add.1, on which the Applicant relies, when contending that the incumbent is to be granted priority, leads to the opposite conclusion. It states that the incumbent should be reviewed "together with other candidates for appointment to the upgraded post". Accordingly, the requirement to give serious

consideration to the performance and experience of the incumbent when reviewing the candidates for a reclassified post cannot mean that the former should be considered separately and be given preference. On the contrary, although the incumbent's merits and experience should always be borne in mind and taken into account as an important element, all candidates should be considered jointly.

VI. Having reached this conclusion, the Tribunal turned to the question of determining which of the bodies and authorities involved in the selection process were subject to the "serious consideration" requirement.

The selection process comprises first a review of the candidates by a Selection Advisory Panel (SAP), then a review by the Appointment and Placement Committee (APC) and finally a decision by the Head of the Office. The Tribunal notes, in this respect, that the provisions of paragraph 3 of CF/AI/352/Amend.4/Add.1 refer only to the advisory bodies and are not extended to the final decision of the Head of the Office.

VII. The Tribunal's next task was to consider whether "serious consideration", in the sense defined above, was afforded to the Applicant by the relevant bodies. The Tribunal, having examined the minutes of the SAP and the APC, concludes that the Applicant's experience and performance as an incumbent of the reclassified post were duly considered. The mere fact that two members of the APC favoured the appointment of the Applicant on those grounds shows that, even if their view did not prevail, those factors were seriously considered by the APC.

VIII. The Tribunal then examined whether prejudice or any other extraneous factor tainted the decisions reached. It came to a negative conclusion, there being no substantial evidence to support the opposite.

IX. The Tribunal also examined whether the relevant rules had been followed and found no significant flaws in procedure that could taint the decision reached by the Administration.

X. Finally, the Tribunal wishes to point out that, in accordance with its consistent practice, it has confined itself to ascertaining whether the relevant rules and regulations have been observed in this instance. It has excluded any consideration of the respective merits of the candidates, which the Tribunal considers to be outside its competence.

XI. For the above mentioned reasons, the application is rejected, including the request for the production of documents.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

New York, 11 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary